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[Rimmer, Matthew](#)

(2015)

Lock the gate: Fracking, investor-state dispute settlement, and the Trans-Pacific Partnership.

(Unpublished)

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Lock the Gate: Fracking, Investor-State Dispute Settlement, and the *Trans-Pacific Partnership*

Matthew Rimmer*

There has been much debate about the relationship between international trade, the environment, biodiversity protection, and climate change.

The Obama Administration has pushed such issues into sharp relief, with its advocacy for sweeping international trade agreements, such as the *Trans-Pacific Partnership*¹ and the *Trans-Atlantic Trade and Investment Partnership*.² There has been much public concern about the impact of the mega-trade deals upon the protection of the environment. In

* Dr Matthew Rimmer (BA/LLB ANU, Phd UNSW) is an Australian Research Council Future Fellow; an Associate Professor at the ANU College of Law; and an Associate Director of the Australian Centre for Intellectual Property in Agriculture (ACIPA). The author would like to thank the organisers and participants at the *New Thinking on Sustainability* conference at the Victoria University of Wellington in February 2014 for their feedback on the paper.

¹ The *Trans-Pacific Partnership*, <http://www.ustr.gov/tpp> and <https://www.dfat.gov.au/fta/tpp/> For a commentary, see Jane Kelsey (ed.), *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement*, Wellington: Bridget Williams Books Inc., 2010; Tania Voon (ed.), *Trade Liberalisation and International Co-operation: A Legal Analysis of the Trans-Pacific Partnership Agreement*, Cheltenham (UK) and Northampton (Mass.): Edward Elgar, 2013; C.L. Lim, Deborah Elms and Patrick Low (ed.), *The Trans-Pacific Partnership: A Quest for a Twenty-First Century Trade Agreement*, Cambridge: Cambridge University Press, 2012; and Jane Kelsey, *Hidden Agendas: What We Need to Know about the Trans-Pacific Partnership Agreement (TPPA)*, Wellington: Bridget Williams Books Limited, 2013.

² The *Trans-Atlantic Trade and Investment Partnership*, <http://www.ustr.gov/ttip> For commentary, see Glyn Moody, 'The TTIP Updates', 2013-2014, <http://blogs.computerworlduk.com/open-enterprise/2013/11/ttip-updates-the-glyn-moody-blogs/index.htm>

particular, there has been a debate about whether the *Trans-Pacific Partnership* will promote dirty fracking. Will the *Trans-Pacific Partnership* transform the Pacific Rim into a Gasland?

There has been a particular focus upon investor-state dispute settlement being used by unconventional mining companies. Investor-state dispute settlement is a mechanism which enables foreign investors to seek compensation from national governments at international arbitration tribunals.³ In her prescient 2009 book, *The Expropriation of Environmental Governance*, Kyla Tienhaara foresaw the rise of investor-state dispute resolution of environmental matters.⁴ She observed:

Over the last decade there has been an explosive increase of cases investment arbitration. This is significant in terms of not only the number of disputes that have arisen and the number of states that have been involved, but also the novel types of dispute that have emerged. Rather than solely involving straightforward incidences of nationalization or breach of contract, modern disputes often revolve around public policy measures and implicate sensitive issues such as access to drinking water, development on sacred indigenous sites and the protection of biodiversity.⁵

In her study, Kyla Tienhaara observed that investment agreements, foreign investment contracts and investment arbitration had significant implications for the protection for the protection of the environment. She concluded that ‘arbitrators have made it clear that they can, and will, award compensation to investors that claim to have been harmed by

³ United Nations Conference on Trade and Development (UNCTAD), ‘Recent Developments in Investor-State Dispute Settlement: Updated for the Multilateral Dialogue on Investment’, April 2014, http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf

⁴ Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*, Cambridge: University of Cambridge Press, 2009.

⁵ Ibid., 1.

environmental regulation.’⁶ She also found that ‘some of the cases suggest that the mere threat of arbitration is sufficient to chill environmental policy development.’⁷ Tienhaara was equally concerned by the ‘possibility that a government may use the threat of arbitration as an excuse or *cover* for its failure to improve environmental regulation.’⁸ In her view, ‘it is evident that arbitrators have *expropriated* certain fundamental aspects of environmental governance from states.’⁹ Tienhaara held: ‘As a result, environmental regulation has become riskier, more expensive, and less democratic, especially in developing countries.’¹⁰

This article provides a comparative analysis of the battles over fracking, investment, trade, and the environment in a number of key jurisdictions – including the United States, Canada, Australia, and New Zealand. Part 1 focuses upon the United States. Part 2 examines the dispute between the Lone Pine Resources Inc. and the Government of Canada over a fracking moratorium in Quebec.¹¹ Part 3 charts the rise of the Lock the Gate Alliance in Australia, and its demands for a moratorium in respect of coal seam gas and unconventional mining. Part 4 focuses upon parallel developments in New Zealand. This article concludes that Pacific Rim countries should withdraw from investor-state dispute settlement procedures, because of the threat posed to environmental regulation in respect of air, land, and water.

1. The United States

⁶ Ibid., 2.

⁷ Ibid., 3.

⁸ Ibid., 3.

⁹ Ibid., 3.

¹⁰ Ibid., 3.

¹¹ *Lone Pine Resources Inc. v. The Government of Canada*, UNCITRAL

<http://www.italaw.com/cases/1606>

In the United States, there has been a boom in the extraction of natural gas in a number of states.¹² As a recent report noted:

Fracking is widespread across the United States. The oil and gas industry are fracking or want to frack in 31 states, with more than 500,000 active natural gas wells throughout the country. The most heavily fracked states are Pennsylvania, Ohio, West Virginia, Oklahoma, and Texas. Fracking and natural gas production are poorly regulated at both the federal and state level. At the federal level, the oil and gas industry is exempt from seven major environmental laws, including the *Safe Drinking Water Act*, the *Clean Air Act*, and the *Clean Water Act*.¹³

There has been much public debate in the United States about the regulation of hydraulic fracturing – known as ‘fracking’.

The intrepid documentary film-maker Josh Fox has made a series of films, *Gasland*, and *Gasland 2*, which raise concerns about the impact of fracking upon air, water, and land.¹⁴ He also charted the larger impacts of the gas industry upon the environment, society, government, and the economy. His work has highlighted the impact of the Bush

¹² Gregory Zuckerman, *The Frackers: The Outrageous Inside Story of the New Energy Revolution*, London and New York: Penguin Books, 2013.

¹³ Natacha Cignotti, Pia Eberhardt, Timothe Feodoroff, Antoine Simon, and Ilana Solomon, *No Fracking Way: How the EU-US Trade Agreement Risks Expanding Fracking*, ATTAC, the Blue Planet Project, Corporate Europe Observatory, Friends of the Earth Europe, Powershift, Sierra Club and the Transnational Institute 2014, http://action.sierraclub.org/site/DocServer/FoEE_TTIP-ISDS-fracking-060314.pdf?docID=15241

¹⁴ Josh Fox, *Gasland*, HBO Documentary Films, 2010, http://www.imdb.com/title/tt1558250/?ref=nm_knf_t1 and Josh Fox, *Gasland 2*, HBO Documentary Films, <http://www.imdb.com/title/tt2795078/>

Administration providing regulatory loopholes for the gas industry, which exempted them from proper environmental regulation. Josh Fox has depicted the development of a strong civil society movement against fracking, which spread around the world. At the recent United States municipal elections, a number of Colorado cities approved bans or moratoriums on fracking.¹⁵ Over a hundred municipalities in the United States have approved similar controls in such of fracking.

There has been a concern that foreign investors can challenge such regulations under investment clauses in the *Trans-Pacific Partnership*. The environmental group – The Sierra Club – has been concerned about the use of investment clauses to challenge public regulation in respect of energy, the environment, and climate change. The Sierra Club warns of an increase in dirty fracking:

The *Trans-Pacific Partnership* may allow for significantly increased exports of liquefied natural gas without the careful study or adequate protections necessary to safeguard the American public. This could mean an increase of hydraulic fracturing, or fracking, the dirty and violent process that dislodges gas deposits from shale rock formations. It would also likely cause an increase in natural gas and electricity prices, impacting consumers, manufacturers, workers, and increasing the use of dirty coal power.¹⁶

¹⁵ Michael Wines, 'Colorado Cities' Rejection of Fracking Poses Political Test for Natural Gas Industry', *The New York Times*, 7 November 2013, <http://www.nytimes.com/2013/11/08/us/colorado-cities-rejection-of-fracking-poses-political-test-for-natural-gas-industry.html?smid=tw-share&r=0>

¹⁶ The Sierra Club, 'An Explosion of Fracking: One of the Dirtiest Secrets of the Trans-Pacific Partnership Free Trade Agreement', <http://www.sierraclub.org/trade/downloads/TPP-Factsheet.pdf>

Michael Brune, the dynamic leader of the Sierra Club has argued: ‘With our jobs, our access to clean air and water and our environment at stake, we deserve a say in the way these trade rules are being written.’¹⁷

Sharon Kelly has commented that the *Trans-Pacific Partnership* could also be a boost for the export of natural gas.¹⁸ She warned: ‘A trade agreement being secretly negotiated by the Obama administration could allow an end run by the oil and gas industry around local opposition to natural gas exports’.¹⁹ Kelly observed: ‘The shale gas rush has caused a glut in the American market thanks to fracking, and now the race is on among industry giants to ship the liquefied fuel by tanker to export markets worldwide, where prices run far higher than in the U.S.’²⁰ The *Trans-Pacific Partnership* has predicted to relax regulatory controls over the export of natural gas. Kelly feared: ‘This will mean that exports to any partner countries will automatically be given a stamp of approval, without having to undergo the public hearings that are otherwise required.’²¹ In particular, there is a concern that the *Trans-Pacific Partnership* will be used to promote the export of natural gas to Japan.²²

¹⁷ Michael Bruce and James Hoffa, ‘Trade is Good When It’s Fair’, *Common Dreams*, 20 September 2013, <https://www.commondreams.org/view/2013/09/20-6>

¹⁸ Sharon Kelly, ‘What a Secretly-Negotiated Free Trade Agreement Could Mean for Fracking in the U.S.’, *DeSmog Blog*, 25 September 2013, <http://www.desmogblog.com/2013/09/25/what-secretly-negotiated-TPP-free-trade-agreement-means-fracking>

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

The Friends of the Earth has also been concerned about the impact of the trade deal, warning that ‘the *Trans-Pacific Partnership* is a potential danger to the planet, subverting environmental priorities, such as climate change measures and regulation of mining, land use, and bio-technology.’²³ The group calls upon Pacific Rim countries to ‘Reject the proposed *Trans-Pacific Partnership* investment chapter that would authorize foreign investors to bypass domestic courts and bring suit before special international tribunals biased in favor of multinationals’.²⁴ Erich Pica, president of Friends of the Earth, commented:

The deal as a whole is a huge danger to the planet. In particular, the investment chapter would allow multinational corporations to undermine important environmental and health regulations. It would also have a chilling effect on future environmental policies that are desperately needed to address climate change, save ecosystems and protect communities.²⁵

The Friends of the Earth was also concerned that the Environment Chapter of the agreement was hollow, simply paying ‘pay lip service to countries’ obligations to enforce domestic environmental protections and abide by global environmental agreements.’²⁶

The climate action network, 350.org, has also objected to the inclusion of an investment clause in the *Trans-Pacific Partnership*.²⁷ The group warns that ‘the Trans-Pacific

²³ The Friends of the Earth, ‘The *Trans-Pacific Partnership*,’ <http://www.foe.org/projects/economics-for-the-earth/trade/trans-pacific-partnership#sthash.OddY6Sdg.dpuf>

²⁴ Ibid.

²⁵ The Friends of the Earth, ‘Friends of the Earth Protest Pacific Trade Deal’, 4 December 2013, <http://www.foe.org/news/blog/2013-12-autumn-agitation-against-pacific-trade-deal#sthash.l7HSTLhz.dpuf>

²⁶ Ibid.

²⁷ 350.Org, ‘Say No to Corporate Power Grabs – Reject the Trans-Pacific Partnership’, <http://campaigns.350.org/petitions/say-no-to-corporate-power-grabs-reject-the-trans-pacific-partnership>

Partnership (TPP) will massively boost corporate power at the expense of our climate and environment, human and workers' rights, sovereignty and democracy.'²⁸ 350.org comments that the 'leaked text reveals that the TPP would empower corporations to directly sue governments in private and non-transparent trade tribunals over laws and policies that corporations allege reduce their profits.'²⁹ The organisation observes that 'Legislation designed to address climate change, curb fossil fuel expansion and reduce air pollution could all be subject to attack by corporations as a result of TPP.'³⁰ The group is concerned that the fossil fuel industry will rely upon investment clauses to challenge fossil fuel divestment efforts.

2. Canada

There has been particular disquiet about the use of state-investor clauses to challenge environmental regulations in Canada.³¹

In 2011, the Quebec National Assembly introduced and passed Bill 18, and placed a moratorium on fracking below the St. Lawrence River in order to allow for a full and timely evaluation of the public health and environmental impacts of such activity.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ The Canadian Press, 'Quebec Fracking Ban Lawsuit: Lone Pine Resources Wants \$250 million from Ottawa', *Huffington Post Canada*, 23 November 2013, http://www.huffingtonpost.ca/2012/11/23/quebec-fracking-ban-lawsuit-lone-pine_n_2176990.html

In 2012, the United States energy company Lone Pine Resources Inc. notified the Canadian Government that it would challenge the moratorium on fracking in Quebec's St Lawrence River under an investment clause Chapter 11 of the *North American Free Trade Agreement* (NAFTA).³² The full complaint was filed on the 6th September 2013.³³

Lone Pine objected to the 'arbitrary, capricious, and illegal revocation of the Enterprise's valuable right to mine for oil and gas under the St. Lawrence River by the Government of Quebec without due process, without compensation, and with no cognizable public purpose.'³⁴ The company complained that there had been a lack of consultation by the Quebec Government:

Between 2006 and 2011, Lone Pine, the Enterprise, and their predecessors expended millions of dollars and considerable time and resources in Quebec to obtain the necessary permits and approvals from the Government of Quebec to mine for oil and gas in the province of Quebec, including beneath the St. Lawrence River. Suddenly, and without any prior consultation or notice, the Government of Quebec introduced Bill 18 into the Quebec National Assembly on May 12, 2011 to revoke all permits pertaining to oil and gas resources beneath the St. Lawrence River without a penny of compensation.³⁵

The energy company lamented: 'Neither Lone Pine nor the Enterprise were given any meaningful opportunity to be heard, any notice that the Act would be passed, or provided any reason or basis for the outright revocation of the Enterprise's permits relating to oil and gas

³² *Lone Pine Resources Inc. v. The Government of Canada*, UNCITRAL <http://www.italaw.com/cases/1606>

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

below the St. Lawrence River'.³⁶ The energy company bemoaned the political decision: 'All they were told was that the Act was "a political decision," and that nothing could be done to prevent it from being passed'.³⁷

Lone Pine claimed that 'the moratorium on fracking violated the provision of NAFTA's investment chapter that offers investors a "minimum standard of treatment" and "fair and equitable treatment."' ³⁸ The company complained that 'Lone Pine and the Enterprise have suffered significant damages as a result of Canada's [alleged] violation of Chapter Eleven of NAFTA.'³⁹

The company has brought this investment action at the same time as it has sought to restructure itself in bankruptcy.⁴⁰ Glyn Moody has also noted that Lone Pine is really a Canadian firm: 'Lone Pine is a Calgary-based firm and would not have standing as a foreign entity to sue Canada under NAFTA [*North American Free Trade Agreement*], but [Lone Pine company president] Granger said it can do so because it is registered in Delaware.'⁴¹

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Jamie Santo, 'Lone Pine Aims to Restructure, Raise \$100 m in Bankruptcy', Law 360, 25 September 2013, <http://www.law360.com/articles/475765/lone-pine-aims-to-restructure-raise-100m-in-bankruptcy>

⁴¹ Glyn Moody, 'Canadian-Based Company Sues Canada Under NAFTA, Saying that Fracking Ban Takes Away Its Expected Profits', *TechDirt*, 4 October 2013, <https://www.techdirt.com/articles/20131004/07500724750/canada-hit-with-another-massive-investor-state-dispute-settlement-demand.shtml>

Martine Châtelain, president of Eau secours!, the Quebec-based coalition for a responsible management of water, argued: ‘Based on the principle of precaution, Quebec government’s response to the concerns of its population is appropriate and legitimate’.⁴² The President maintained: ‘No companies should be allowed to sue a State when it implements sovereign measures to protect water and the common goods for the sake of our ecosystems and the health of our peoples.’⁴³

In her book, *Blue Planet*, Maude Barlow of the Council of Canadians is disturbed by the use of investor-state dispute settlement: ‘This “investment arbitration boom” is costing taxpayers billions of dollars and preventing legislation in the public interest.’⁴⁴ She fears that investment clauses are ‘used to gain access to the commons resources of other countries, placing the world’s forests, fish, minerals, land, air, and water supplies under direct control of transnational corporations.’⁴⁵ Barlow maintains that the Lone Pine action is an attack upon Quebec’s public management of its water rights.

⁴² Sierra Club and Council of Canadians, ‘Lone Pine Resources Files Outrageous NAFTA Lawsuit Against Fracking Ban’, Press Release, 2 October 2013, <https://content.sierraclub.org/press-releases/2013/10/lone-pine-resources-files-outrageous-nafta-lawsuit-against-fracking-ban>

⁴³ Ibid.

⁴⁴ Maude Barlow, *Blue Future: Protecting Water for People and the Planet Forever*, Toronto: The New Press, 2013, 217.

⁴⁵ Ibid., 214-215.

Stuart Trew of the Council of Canadians maintained that ‘Quebec’s moratorium on fracking is legal and supported strongly by the public’.⁴⁶ He maintained that ‘corporate profit should never get in the way of environmental and public health safeguards’. Stuart Trew insisted: ‘It’s outrageous to even think that we may have to pay Lone Pine not to drill in the St. Lawrence River’.⁴⁷ Trew contended: ‘Trade rules shouldn’t be used to appease the whims of dirty oil and gas companies.’⁴⁸

Ilana Solomon of the Sierra Club observed: ‘My right to clean water, clean air, and a healthy planet for my family and community has to come before Lone Pine’s right to mine and profit’.⁴⁹ She warned: ‘This egregious lawsuit - which Lone Pine Resources must drop - highlights just how vulnerable public interest policies are as a result of trade and investment pacts.’⁵⁰ She observed: ‘Governments should learn from this and other similar cases and stop writing investment rules that empower corporations to attack environmental laws and policies.’⁵¹ Highlighting the case study of Lone Pine Island, Ilana Solomon has warned against the inclusion of investment clauses in the *Trans-Pacific Partnership*.

⁴⁶ Sierra Club and Council of Canadians, ‘Lone Pine Resources Files Outrageous NAFTA Lawsuit Against Fracking Ban’, Press Release, 2 October 2013, <https://content.sierraclub.org/press-releases/2013/10/lone-pine-resources-files-outrageous-nafta-lawsuit-against-fracking-ban>

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Ilana Solomon, ‘No Fracking Way: How Companies Sue Canada to Get More Resources’, *The Huffington Post*, 10 March 2013, http://www.huffingtonpost.ca/ilana-solomon/lone-pine-sues-canada-over-fracking_b_4032696.html See also: Ilana Solomon of the Sierra Club discussing the Lone Pine Island dispute and the *Trans-Pacific Partnership* <http://vimeo.com/79027080>

⁵⁰ Ibid.

⁵¹ Ibid.

Elizabeth May, the leader of the Green Party of Canada, has expressed concerns about investor-state provisions being used to challenge sustainability or environmental protection measures in Canada – such as the action by the US energy company Lone Pine Resources against Quebec’s moratorium on fracking.⁵² She observed: ‘Such cases represent clear barrier to environmental protection and regulation in Canada.’⁵³ Her preference was that the *Trans-Pacific Partnership* should not include investor clauses at all.⁵⁴ May maintained: ‘At minimum, I would insist that any inclusion of investor-state arbitration clauses into the *Trans-Pacific Partnership Free Trade Agreement* include clearly stated exceptions against claims of expropriation for any laws or regulations pertaining to environmental, social, or labour policies that a future government may want to pursue.’⁵⁵

3. Australia

In his excellent book, *What the Frack?*, investigative journalist Paddy Manning charts the conflicts in Australia over unconventional resources:

In Australia, where coal seam gas has taken off in the space of a decade, the land is the battleground: grazing country, cropping country, state forest, water catchment areas, rural-residential and even urban

⁵² Elizabeth May MP, ‘Submission: Environmental Assessment of *Trans-Pacific Partnership Free Trade Agreement*’, the Green Party of Canada, 29 January 2013, <http://elizabethmaymp.ca/submission-environmental-assessment-tpp>

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Ibid.

areas. Nowhere appears to be off-limits for this new industry that has coined a new vernacular: ‘gas mining’.⁵⁶

Manning observed that ‘two key technological breakthroughs in America have opened up huge new possibilities in unconventional gas extraction: horizontal drilling and hydraulic fracturing, often shortened to ‘hydro-fracking’ or just ‘fracking’.⁵⁷ There has been significant public debate over fracking in a variety of regions across Australia, including New South Wales,⁵⁸ Victoria,⁵⁹ Queensland,⁶⁰ South Australia,⁶¹ and Western Australia.⁶²

Ian Macfarlane, the new industry minister for the Coalition Conservative Government, has been a great supporter of coal seam gas. He has argued that mining companies should extract all the possible resources:

⁵⁶ Paddy Manning, *What the Frack? Everything You Need to Know about Coal Seam Gas*, Sydney: New South Books, 2012, 14.

⁵⁷ Ibid., 14.

⁵⁸ Ben Cubby and Esther Han, ‘AGL Breaks Fracking Pledge’, *The Sydney Morning Herald*, 16 January 2013, <http://www.smh.com.au/environment/conservation/agl-breaks-fracking-pledge-20130115-2crlld.html> and Australian Associated Press, ‘Santos Fined After Coal Seam Gas Project Contaminates Aquifer “With Uranium”’, *The Guardian*, 8 March 2014, <http://www.theguardian.com/world/2014/mar/08/santos-fined-coal-seam-gas-contaminates-aquifer-uranium>

⁵⁹ Henrietta Cook, ‘Victorian Ban on Fracking to Stay Until 2014’, *The Age*, 21 November 2013, <http://www.theage.com.au/victoria/victorian-ban-on-fracking-to-stay-until-2015-20131121-2xxau.html>

⁶⁰ Malcolm Sutton, ‘Fracking Health Fears’, *Queensland Country Life*, 17 June 2013, <http://www.queenslandcountrylife.com.au/news/agriculture/general/news/fracking-health-fears/2659796.aspx>

⁶¹ Caroline Winter, ‘Fracking Worries for Wine Region’, ABC PM, 20 March 2014, <http://www.abc.net.au/pm/content/2014/s3968209.htm>

⁶² Sue Lannin, ‘New Shale Gas Fracking Draft Regulations Released for WA’, *ABC News*, 6 February 2014, <http://www.abc.net.au/news/2014-02-05/draft-shale-gas-fracking-regulations-released/5240884>

We've got to make sure that every molecule of gas that can come out of the ground does so. Provided we've got the environmental approvals right, we should develop everything we can.⁶³

At a Federal level, the Australian Greens have pushed back, and demanded that farmers should have the legal right to refuse fracking.⁶⁴

There has been much debate about the regulation of coal seam gas at both a Federal level, and in the States of Victoria, New South Wales, Queensland, Western Australia

In Australia, the issue of whether farmers can 'Lock the Gate' to mining companies has united farmers, environmentalists, and climate change activists.⁶⁵ The Lock the Gate Movement is concerned that 'mining and unconventional gas companies are riding roughshod over our governments and local communities' and 'our farmland, bushland and water resources are being put at risk.' The Lock the Gate movement wants to ban fracking in Australia: 'Our Call to Country provides a plan for national reform that delivers a moratorium on unconventional gas mining and a Royal Commission into corruption and maladministration associated with the mining industry.'⁶⁶ Gabrielle Chan has observed that

⁶³ Ben Packham, 'Use It or Lose It, Miners Warned by Coalition', *The Australian*, 18 September 2013, <http://www.theaustralian.com.au/national-affairs/use-it-or-lose-it-miners-warned-by-coalition/story-fn59niix-1226721368923#sthash.jWWQRUXb.dpuf>

⁶⁴ Larissa Waters, 'Call to Give Farmers the Legal Right to Refuse Fracking', the *Australian Greens*, 13 February 2014, <http://larissa-waters.greensmps.org.au/content/motions/call-give-farmers-legal-right-refuse-fracking>

⁶⁵ Lock the Gate Alliance, <http://www.lockthegate.org.au/> and Lock the Gate Alliance, Call to Country <http://www.youtube.com/watch?v=X4-dUKBvwrY>

⁶⁶ Ibid.

the ‘alliance between farmers and the environmental movement on land issues around coal seam gas and mining’ has ‘the capacity to change the political landscape in rural Australia and leave a scar as gaping as an open-cut mine on the predominant Coalition support.’⁶⁷ The Lock the Gate movement has demanded greater regulation of coal, and coal seam gas in order to protect agriculture, farming, the environment, and the climate.⁶⁸

On the 1st October 2013, the Lock the Gate Alliance and the Australian Fair Trade and Investment Network (AFTINET) put out a joint statement,⁶⁹ expressing ‘their strong opposition to clauses in trade agreements which would enable foreign investors to sue governments for damages in international tribunals if government regulation is seen to ‘harm’ their investment’.⁷⁰ Drew Hutton, the President of Lock the Gate, observed: ‘Investor State

⁶⁷ Gabrielle Chan, ‘Farmers Joining Environmental Movement in their Fight Against Mining’, *The Guardian*, 10 April 2014, <http://www.theguardian.com/news/bush-mail/2014/apr/10/farmers-joining-environmental-movement-in-their-fight-against-mining>

⁶⁸ For a legal analysis of the Lock the Gate movement, see Janice Gray and David Brown, ‘Constituencies of Resistance to Coal Seam Gas Mining, the Political Art of Suture and the Public Good’, *New Thinking on Sustainability*, Victoria University of Wellington, 16 February 2014, <http://www.victoria.ac.nz/law/about/events-old/nz-centre-for-public-law/new-thinking-on-sustainability>

⁶⁹ The Lock the Gate Alliance and the Australian Fair Trade and Investment Network, ‘Rural anti-gas mining groups say no to investors suing governments for environmental regulation as Trans-Pacific trade talks resume’, Press Release, 2 October 2013, <http://aftinet.org.au/cms/sites/default/files/Robb%20Media%20Release%20October%20202013%20-%20Copy.pdf> The Lock the Gate Alliance and the Australian Fair Trade and Investment Network, ‘Letter to the Hon. Andrew Robb, Minister for Trade and Investment’, 1 October 2013, <http://aftinet.org.au/cms/sites/default/files/AFTINET%20%26%20LTG%20letter%20Minister%20Robb%20300913%20-%20Copy.pdf>

⁷⁰ Ibid.

Dispute Settlement would reduce the ability of governments to regulate the activities of foreign companies even if these activities have a negative impact on health and the environment.’⁷¹ He worried: ‘This would prevent governments from responding to community concerns about Coal Seam Gas mining (CSG)’.⁷²

Hutton was particularly concerned about the precedent of the Lone Pine energy company using ISDS clauses in the North American Free Trade Agreement to sue the Canadian Quebec provincial government for \$250 million over a moratorium on fracking. He noted that ‘farmers and community members in NSW and Victoria have influenced their state governments to review the environmental impact of CSG mining and to consider regulation’.⁷³ Hutton concluded: ‘If Australia agrees to include ISDS in trade agreements, governments could be sued for millions of dollars for responding to community concerns.’⁷⁴

Isabel McIntosh from Lock the Gate has expressed concerns about the impact of the *Trans-Pacific Partnership* on the public regulation of coal and coal seam gas:

A trade agreement with investor–state dispute settlement provisions that are being discussed for the *Trans Pacific Partnership Agreement* will lock the door on our electoral democracy. The restrictions imposed could tie the hands of government to regulate in areas such as foreign investment in farmland and the expansion of coal and CSG. It is this regulation on CSG and coal that is critical: we campaign, the government then plays catch up as the power shifts into the community’s hands and the voices of

⁷¹ Ibid.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

independent experts lead the conversation. But if a trade agreement is signed that puts the power in the hands of overseas companies, then it's over.⁷⁵

McIntosh worries that 'the *Trans-Pacific Partnership Agreement* will protect the rights of corporate investors at the expense of democratic governance'.⁷⁶ She was concerned that the mining industry 'want to jeopardise land and water security for the short-term – and diminishing – profits of fossil fuels'.⁷⁷ In her view: 'If the mining industry is allowed to carry out its business plan, the planet tanks'.⁷⁸ McIntosh comments: 'Whether through invasive mining or the impact of catastrophic climate change, Australia's agricultural land will diminish to a fraction of what it is now.'⁷⁹

Considering the *Trans-Pacific Partnership* and the Lone Pine Island case, Richard Denniss of the Australia Institute observed that the matter of free trade and fracking could divide and fracture the Conservative Government – a coalition of the Liberal Party and the National Party - in Australia: 'The issues of coal seam gas and free trade are combining to create a perfect storm for the National Party, and in turn, the Coalition government.'⁸⁰ He commented: 'The problem for Tony Abbott and Warren Truss is that CSG forces the

⁷⁵ Isabel McIntosh, 'A Trans-Pacific Partnership Agreement will lock the Door on Our Electoral Democracy', *Lock the Gate*, 25 October 2013, <http://isabelmcintosh.wordpress.com/2013/10/25/a-tppa-will-lock-the-door-on-our-electoral-democracy/>

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Richard Denniss, 'Trade Threatens to Split Coalition', *Australian Financial Review*, 22 September 2013, http://www.afr.com/p/opinion/trade_threatens_to_split_coalition_mMYN42vDfryQZX96Wl5MiO

Coalition partners to decide whether they are on the side of farmers or the mining industry.’⁸¹ Denniss noted that ‘the issue of foreign investment forces them to choose whether they are on the side of free trade or Australian sovereignty.’⁸² He concluded: ‘Both issues could end up splitting the Coalition, and if they don’t, they will likely deliver more National Party seats to the Palmer United Party, Katter’s Australian Party or independents willing to put their constituents’ interests first.’⁸³ The Australian Greens have sought to capitalise upon the disharmony within the Coalition over matters of trade and the environment.⁸⁴

There will be a consideration of the use of investor-state dispute settlement in an inquiry by the Australian Senate in 2014. In light of this debate, the Australian Greens have introduced the *Trade and Foreign Investment (Protecting the Public Interest) Bill 2014* (Cth) into Parliament. In his second reading speech, Senator Peter Whish-Wilson commented upon the objective of the legislative bill:

This Bill seeks to ban ISDS provisions in new trade agreements. The Greens believe there shouldn’t be ISDS provisions in any agreements, but we recognise that the legislation we are presenting is not retrospective. Sovereign governments should not be challenged simply for making laws to govern their country or making a decision to protect their environment or the health of their citizens. What happens

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Gabrielle Chan, ‘Farmer’s Daughter Christine Milne Finds Rural Community Tough to Crack’, *The Guardian*, 11 April 2014, <http://www.theguardian.com/news/bush-mail/2014/apr/11/farmers-daughter-christine-milne-finds-rural-community-tough-to-crack>

to laws governing coal seam gas legislation or the ban on genetically manipulated organisms in my home state of Tasmania? Under ISDS there is great uncertainty. Uncertainty that is unnecessary.⁸⁵

The Senator commented: ‘The Australian people elect their governments and their parliaments to design and implement legislation. Their sovereignty should be respected.’⁸⁶

4. New Zealand

There has also been controversy in New Zealand over the Conservative Government’s push to mine Middle Earth, with the end of the filming of series of *The Hobbit*.⁸⁷

Gareth Hughes MP of the New Zealand Greens commented:

Protections afforded to foreign investors under the *Trans-Pacific Partnership* will seriously undermine our environment. Similar agreements have resulted in Governments being forced to pay billions because they put in place rules to protect the environment from harm caused by foreign corporations.⁸⁸

⁸⁵ Senator Peter Whish-Wilson, ‘Second Reading Speech on the *Trade and Foreign Investment (Protecting the Public Interest) Bill* 2014’, Australian Senate, Australian Parliament, 5 March 2014, 902-904, http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/3a8e6372-a9f6-4c1a-abdd-279cbfe5aec3/0133/hansard_frag.pdf;fileType=application%2Fpdf

⁸⁶ Ibid.

⁸⁷ Graham Readfearn, ‘New Zealand Pushing Plans to Drill Middle-Earth as Hobbit Filming Ends’, *The Guardian*, 29 July 2013, <http://www.theguardian.com/environment/planet-oz/2013/jul/29/hobbit-new-zealand-lord-of-the-rings-middle-earth-oil-gas-drilling>

⁸⁸ Green Party, ‘Government Failing the Environment in the TPP Talks’, *Scoop NZ*, 16 January 2014, <http://www.scoop.co.nz/stories/PA1401/S00057/government-failing-the-environment-in-tpp-talks.htm>

He observed: ‘In a democracy, people should have the right to know the detail of, and have input into, international agreements that the National Government wants to sign us up to.’⁸⁹

The New Zealand Sustainability Council has observed that ‘The environment will be a major loser under terms put forward for the latest free trade deal.’⁹⁰ The Council is alarmed that the mechanism of investor-state dispute clauses ‘would give foreign companies the ability to sue a government in an offshore tribunal if that company believed its reasonable investment expectations (such as its profits or asset values) had been breached’.⁹¹ The Council worries that such a regime ‘ends up privileging foreign companies over local communities and local companies who do not have such rights to sue.’⁹²

Professor Jane Kelsey from the University of Auckland has noted that the investment chapter could affect the environment in a number of ways, with ‘challenges to tighter rules on mining and remediation rules, bans on fracking and nuclear energy, performance requirements on foreign investors to use of clean technology, restrictions on numbers and locations of waste plants or eco-tourism projects, not lowering environmental standards to attract investors.’⁹³

⁸⁹ Ibid.

⁹⁰ Sustainability Council of New Zealand, ‘The TPP’s Threat to the Environment’, April 2013, <http://www.sustainabilitynz.org/wp-content/uploads/2013/08/TheTPPThreatToTheEnvironment2013.pdf>

⁹¹ Ibid.

⁹² Ibid.

⁹³ Jane Kelsey, ‘TPPA Environment Chapter & Chair’s Commentary Posted by WikiLeaks Issues for NZ’, 16 January 2014, <https://wikileaks.org/tppa-environment-chapter.html>

Professor Jane Kelsey has been concerned about the undemocratic nature of the trade negotiations.⁹⁴ She reflected that fair trade deals are possible: ‘It would be possible to conceive of a twenty-first century trade agreement that reflected this realisation and embraced a socially progressive and democratic agenda where governments put their people centre stage in the negotiations.’⁹⁵ Kelsey was concerned: ‘The failure of governments to seize that opportunity means that the *Trans-Pacific Partnership* negotiations are destined to become a fraught arena in which ideologies, interests and agendas compete.’⁹⁶

Conclusion

The *Trans-Pacific Partnership* poses significant threats to the environmental protection of the air, water, and land in the Pacific Rim. There has been a groundswell of support for public regulation of fracking in the United States, Canada, Australia, and New Zealand. There have also been similar concerns raised about the *Trans-Atlantic Trade and Investment Partnership*, and its impact upon the regulation of fracking in the European Union.⁹⁷

⁹⁴ Jane Kelsey, ‘Introduction’ in Jane Kelsey (ed.), *No Ordinary Deal: Unmasking the Trans-Pacific Partnership Free Trade Agreement*, Wellington: Bridget Williams Books Inc., 2010, 9-28 at 28.

⁹⁵ Ibid., 28.

⁹⁶ Ibid., 28.

⁹⁷ Natacha Cignotti, Pia Eberhardt, Timothe Feodoroff, Antoine Simon, and Ilana Solomon, *No Fracking Way: How the EU-US Trade Agreement Risks Expanding Fracking*, ATTAC, the Blue Planet Project, Corporate Europe Observatory, Friends of the Earth Europe, Powershift, Sierra Club and the Transnational Institute 2014, http://action.sierraclub.org/site/DocServer/FoEE_TTIP-ISDS-fracking-060314.pdf?docID=15241

There has been concern that trade agreements, with investment clauses, have been used to challenge public regulation, particularly in respect of the environment. The environmental writer George Monbiot has warned of the dangers of investment clauses in trade deals:

Investor-state rules could be used to smash any attempt to save the NHS from corporate control, to re-regulate the banks, to curb the greed of the energy companies, to renationalise the railways, to leave fossil fuels in the ground. These rules shut down democratic alternatives. They outlaw left-wing politics.⁹⁸

Professor Joseph Stiglitz, the Nobel Prize winner in Economics, has similarly warned that such agreements would ‘significantly inhibit the ability of developing countries’ governments to protect their environment from mining and other companies.’⁹⁹ That is a particularly acute concern for developing countries in the Pacific Rim. Stiglitz has emphasized that there is a need to ensure fairness, equality, and equity in trade and globalization – particularly with respect to environmental outcomes.¹⁰⁰

As such, countries across the Pacific Rim and the Atlantic would be well-advised to scorn the inclusion of investor-state dispute settlement in mega-trade agreements. The Pacific Rim should not be turned into a Gasland.

⁹⁸ George Monbiot, ‘A Global Ban on Left-Wing Politics’, *The Guardian*, 4 November 2013, <http://www.monbiot.com/2013/11/04/a-global-ban-on-left-wing-politics/>

⁹⁹ Joseph Stiglitz, ‘Developing Countries are Right to Resist Restrictive Trade Agreements’, *The Guardian*, 9 November 2013, <http://www.theguardian.com/business/2013/nov/08/trade-agreements-developing-countries-joseph-stiglitz>

¹⁰⁰ Joseph Stiglitz, ‘On the Wrong Side of Globalization’, *The New York Times*, 15 March 2014, <http://opinionator.blogs.nytimes.com/2014/03/15/on-the-wrong-side-of-globalization/>